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In the Supreme Court
OF THE
United States

October Term, 1970

No. 1118

Steven C. Tinkham and Helen Tinkham,
Petitioners,
vs.
Immigration and Naturalization Service,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

STAVROS C. THOMAIDIS and
HELENA THOMAIDIS,
Petitioners,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The petitioners, Stavros C. Thomaidis and Helena Thomaidis, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming a final order of the Immigration and Naturalization Service.

OPINIONS BELOW

The decision of the Special Inquiry Officer denying the female petitioner's application for adjustment of status under the provisions of Section 245 of the Immigration and Nationality Act, as amended (66 Stat. 217, as amended August 21, 1958, 72 Stat. 699, July 14, 1960, 74 Stat. 505, and October 3, 1965, 79 Stat. 918, 8 USC 1255), is set forth in the certified administrative record (R. 40-41), and printed in Appendix C hereto, infra, p. iv.

The decision of the Board of Immigration Appeals, dated March 28, 1969, affirming the order of the Special Inquiry Officer, is set forth in the certified administrative record (R. 15-17), and printed in Appendix D hereto, infra, p. x.

An order of the Board of Immigration Appeals, dismissing petitioner's motion for reconsideration, dated May 16, 1969 is set forth in the certified administrative record (R. 1), and printed in Appendix E hereto, infra, p. xiv.

The opinion of the Court of Appeals, affirming the administrative decision, is printed in Appendix A hereto, infra, pp. i-ii, and is reported in the official reports at 431 F.2d 711.

JURISDICTION

The Judgment of the Court of Appeals was filed and entered on September 18, 1970. (Appendix B, pp. iii). The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Is it an abuse of discretion for a Special Inquiry Officer to refuse independent exercise of discretion, as provided by law, and reject an application for adjustment of status relying upon a prior decision of the Board of Immigration Appeals refusing the exercise of discretion in an unrelated case?

2. Is it an abuse of discretion for a Special Inquiry Officer of the Immigration and Naturalization Service to deny an application for adjustment of status where the reasons set forth for such denial are not supported by evidence of record?

STATUTES AND RULES INVOLVED

Section 245 of the Immigration and Nationality Act:

> "Adjustment of status of nonimmigrant to that of person admitted for permanent residence; record; natives of contiguous country or adjacent island
>
> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

(b) Upon the approval of an application for adjustment made under subsection (a) of this section, the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference or nonpreference visas authorized to be issued under Section 1153(a) of this title within the class to which the alien is chargeable, for the fiscal year then current.

(c) The provisions of this section shall not be applicable to any alien who is a native of any country of the Western Hemisphere or of any adjacent island named in section 1101(b)(5) of this title." As amended Aug. 21, 1958, Pub. L. 85-700, §1, 72 Stat. 699; July 14, 1960, Pub. L. 86-648, §10, 74 Stat. 505; Oct. 3, 1965, Pub. L. 89-236, §13, 79 Stat. 918.

The administrative regulations of the Immigration and Naturalization Service governing the conduct and authority of the Special Inquiry Officer, insofar as pertinent here, are printed in Appendix F hereto, infra, p. xvi.

STATEMENT OF THE CASE

Petitioners are husband and wife, approximately 48 and 46 years of age, respectively. The male petitioner is a native of Turkey and a citizen of Greece. The female petitioner is a native of Egypt and a citizen of Greece. Both were last admitted to the

United States at Detroit, Michigan, on or about November 18, 1964, as temporary visitors. Both have remained continuously in the United States since that date. The names of both petitioners have been included in the instant petition for writ of certiorari inasmuch as a combined hearing was held in their cases by the Immigration and Naturalization Service. This petition, however, has been filed solely for the purpose of seeking review of the administrative action denying the female petitioner's application for adjustment of status under Section 245 of the Immigration and Nationality Act.[1]

On August 12, 1965, a Special Inquiry Officer entered an order that both petitioners be deported from the United States to Argentina on the charge set forth in the order to show cause. Their appeal from that decision was dismissed by the Board of Immigration Appeals on December 1, 1965. On or about November 27, 1967, the San Francisco Office of the Immigration and Naturalization Service filed with the Board of Immigration Appeals a document entitled "Motion to Reconsider" stating that the Service requested that the proceedings be reopened and remanded to the Special Inquiry Officer for the purpose set forth therein (R. 101). Counsel for petitioners concurred, requesting that the female petitioner be afforded an opportunity during the course of the reopened proceeding to file an application for adjustment of status (R. 98). On January 15, 1968,

---

[1] If the female petitioner's application is granted, then the male petitioner could also apply for such relief. Special Inquiry Officer's decision, August 28, 1968, page 4 (R. 41).

the Board of Immigration Appeals ordered that the proceedings be reopened for the purposes requested (R. 96).

At the time of the hearing held at the San Francisco Office of the Immigration and Naturalization Service on August 28, 1968, the Trial Attorney advised the Special Inquiry Officer that the female petitioner had been accorded a preference classification under Section 203(a)(6), (8 USC 1153(a)(6)), on the basis of a petition filed in her behalf on October 13, 1967; that the application had been fully processed and that a quota number was then available for her use (R. 48, App. G). In his decision dated August 28, 1968, the Special Inquiry Officer stated—

> "Since coming to the United States neither the male respondent nor his wife have had any brushes with the law. They have solidly established themselves in this country. Because of this, I would be inclined to grant her application for status as a permanent resident under Section 245.".

but he concluded that he could not exercise favorable discretion because the Board of Immigration Appeals in unrelated cases held that such applications should not be granted. (R. 40-41, Appendix C, infra, p. viii).

The decision of the Board of Immigration Appeals (Appendix D), affirms the order of the Special Inquiry Officer and denied the appeal. A motion for reconsideration was dismissed by the Board of Immigration Appeals on May 16, 1969 (Appendix E).

In a per curiam opinion dated September 18, 1970, the Court of Appeals affirmed the administrative de-

cision holding that they could find no abuse of discretion (Appendix A). The Court of Appeals for the Ninth Circuit granted a stay of mandate under Rule 41(a) of the Federal Rules of Appellate Procedure provided this Petition for Writ of Certiorari was filed in the Clerk's Office of the Supreme Court of the United States on or before December 18, 1970.

The petition seeking review of the administrative order was timely filed, within six months, in the Court of Appeals. Jurisdiction of the Court of Appeals to entertain said petition is conferred by Public Law 87-301, effective October 26, 1961, 75 Stat. 651, 8 USC 1105a.

REASONS FOR GRANTING THE WRIT

This writ of certiorari is sought because the decisions below present important questions affecting the exercise of discretion by the Immigration and Naturalization Service in adjusting the status of deportable aliens to that of lawful permanent residents of the United States. In addition, the decisions below appear to be in direct conflict with decisions of this Court and contrary to regulations, in effect, governing proceedings such as had herein.

1. Although the exercise of agency discretion is not substantively reviewable, a Court may examine the record to see whether discretion has been exercised. *Dessalernos v. Savoretti*, 356 U.S. 269, 2 L.Ed. 2d 751, 78 S.Ct. 690; *United States v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499.

In the case of *United States v. Shaughnessy*, supra, this Court, at pages 266-267, stated:

> "The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner."

Regulations which were in effect at the time of the Special Inquiry Officer's administrative decision (Appendix E, p. xvii) made his decision final—unless the case was certified to the Board of Immigration Appeals, or an appeal was taken to the Board of Immigration Appeals—but more importantly specifically provided that he should exercise his own independent judgment when considering the application for discretionary relief.

Even though the decision of this Court in *United States v. Shaughnessy, supra,* quoted above, specifi-

cally referred to the exercise of the discretionary authority conferred by regulations on the Board, the clear import applies equally as well to the exercise of discretionary authority by the Special Inquiry Officer as dictated by the regulations.

As set forth in the Statement of the Case, the Special Inquiry Officer clearly indicated that he was inclined to grant the female petitioner's application for adjustment of status to that of a permanent resident. Relying upon decisions of the Board of Immigration Appeals in unrelated cases, he then denied the application—thus refusing to exercise his own independent judgment. The female petitioner was entitled to due process, which included an independent judgment on the question of exercise of discretion pursuant to the regulations which had the force and effect of law. *Bridges v. Wixon*, 326 U.S. 135.

The decision of the Special Inquiry Officer is in direct conflict with the decisions of this Court in *United States v. Shaughnessy*, supra, and *Bridges v. Wixon*, supra. Because of the importance of the principle enunciated by this Court, certiorari is appropriate.

2. The decision of the Court below held that the administrative decision could only be overturned if there was abuse of discretion; that the burden was upon the petitioner "to establish that the application merits favorable consideration" and that there was no abuse of discretion here.

The right to a fair hearing in conformity with prevailing standards is firmly established. *United*

States v. Shaughnessy, supra. Even though Section 245 of the Act (8 USC 1255) contains no expressed statutory grant of a hearing on an application for the benefits of that section, the Attorney General, for the purpose of effectuating this statutory provision, adopted regulations delegating his authority under Section 245 of the Act in certain instances to Special Inquiry Officers. (Appendix F, p. xvi). In addition, those regulations specifically provide that the decision of the Special Inquiry Officer and the Board of Immigration Appeals must be supported by the evidence of record unless the Commissioner of the Immigration and Naturalization Service "has determined that it is in the interest of national security and safety" to rely upon information not contained in the record (Appendix F, p. xvii).

The decisions of the Special Inquiry Officer and the Board of Immigration Appeals did not consider the application of the female petitioner for adjustment of status under Section 245 of the Act, supra, solely upon the evidence of record, but considered—in reaching their determinations (contrary to the regulations) decisions reached in different factual situations. This Court has held that where immigration administrative decisions have not conformed to the traditional standards of fairness required by the due process of law clause of the Fifth Amendment to the Constitution of the United States; *Kwong Hai Chew v. Colding*, 334 U.S. 590; *Wong Yang Sung v. McGrath*, 339 U.S. 33; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103; *Japanese Immigrant Case*, 189 U.S. 86—or where

there has been arbitrariness or abuse of discretion by the administrative agency, *Carlson v. Landon*, 342 U.S. 524; *Kwock Jan Fat v. White*, 253 U.S. 454—or where the law has been incorrectly applied, *McGrath v. Kristensen*, 340 U.S. 162; *Fong Haw Tan v. Phelan*, 333 U.S. 6; *Bridges v. Wixon*, supra, that intervention by the Court is obligatory.

Rejection of an application by administrative discretionary fiat under circumstances such as contained herein, where the administrative agency fails to comply with its own guide lines, is a denial of vital rights guaranteed by the Constitution and laws of our nation. The regulations which have the effect of law and are binding upon the Service specifically prescribe that the exercise of discretion entails the evaluation of each individual case upon its own merits and upon the evidence of record unless it falls within the exception which is not applicable here.

The exercise of administrative discretion must be consistent with "the fundamental principles of justice embraced within the conception of due process of law." *Tang Tang v. Edsell*, 223 U.S. 673; *Carlson v. Landon*, supra.

It affirmatively appears that the administrative denial is predicated upon evidence not a part of the female petitioner's deportation hearing, which included processing of her application for adjustment of status. Thus, the administrative order, contrary to the decision of the Court below, reflects a denial of the basic principles enunciated by this Court in the opinions cited above.

CONCLUSIONS

The decision below is in conflict with decisions of this Court. The failure of the administrative agency in its decisions to comply with its own regulations is in conflict with decisions of this Court.

For these reasons, petitioners respectfully request that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
December 10, 1970.

Joseph S. Hebrard,
Attorney for Petitioners.

(Appendices A, B, C, D, E, F and G Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 24,208

STAVROS C. THOMAIDIS and
HELENA THOMAIDIS,
Petitioners,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

[September 18, 1970]

Review of Order of
Board of Immigration Appeals.

Before: Chambers and Koelsch, Circuit Judges,
and Powell, District Judge.*

Per Curiam:

The Board of Immigration Appeals denied Helena Thomaidis discretionary relief under Section 245 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1255. Petitioner and her husband are both citizens of Greece. They entered the United States as nonimmigrant visitors in 1963. They were made the subjects of deportation proceedings. They left in

*The Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

August 1964 and reentered in November 1964 again with non-immigrant visitors' visas. The purpose of their return was to have a private bill introduced to enable them to become permanent residents.

Petitioner and her husband stayed in the United States longer than permitted as visitors. They were ordered deported to Argentina but were not permitted to enter there. The case was remanded to the Special Inquiry Officer who held a hearing on petitioner's application for adjustment of status to that of permanent resident as well as to designate a country other than Argentina to which both parties should be deported.

The Special Inquiry Officer denied petitioner's application for status as a permanent resident and granted voluntary departure. If petitioner and her husband failed to depart voluntarily he ordered their deportation to Greece. The appeal was denied by the Board March 28, 1969. This review followed.

The petitioner was eligible for relief under 8 U.S.C. 1255 but that does not mean she would automatically be accorded adjustment of status. The Attorney General must exercise discretion and it is only in cases of abuse that his decision will be overturned. *Chen v. Foley*, 385 F.2d 929, 934 (6 Cir. 1967). The burden is upon the alien to establish that the application merits favorable consideration. *Santos v. Immigration & Naturalization Service*, 375 F.2d 262, 264 (9 Cir. 1967). Nothing in *Matter of Arai*, Int. Dec. 2027 alters the view that relief is discretionary. We find no abuse of discretion here.

Affirmed.

Appendix B

United States Court of Appeals for the Ninth Circuit

No. 24,208

STAVROS C. THOMAIDIS and HELENA THOMAIDIS,
Petitioners,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

JUDGMENT

Upon Petition to Review an order of the Immigration and Naturalization Service.

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is affirmed.

Filed and entered: Sept. 18, 1970.

A True Copy
Attest, Dec. 2, 1970,
Wm. B. Luck, Clerk.

Appendix C

United States Department of Justice
Immigration and Naturalization Service
In Deportation Proceedings

August 28, 1968

Files: A13 858 350 and
A13 876 264 — San Francisco, California

In The Matter Of
Stavros Constantin Thomaidis and
his wife, Helena Thomaidis,
Respondents.

Charge: (Both respondents)
I & N Act—Section 241(a)(2)—remained longer, visitors.

Applications:
I & N Act—Section 245, status as permanent resident (female respondent)
—None (male respondent)

In Behalf of Respondents:
Joseph S. Hertogs, Esq.,
580 Washington Street,
San Francisco, California 94111.

In Behalf of Service:
Stephen M. Suffin, Esq.,
Trial Attorney,
San Francisco, California.

DECISION OF THE SPECIAL INQUIRY OFFICER

On August 12, 1965, I entered a decision in these cases ordering that the respondents be deported from the United States to Argentina on the charge set forth in the Orders to Show Cause. Their appeal from that decision was dismissed by the Board of Immigration Appeals on December 1, 1965. Subsequently, the Service moved that the cases be remanded to the Special Inquiry Officer so that a new designation of the country of deportability might be made pursuant to Section 243(a) of the Immigration and Nationality Act. In this motion it was pointed out that both of the respondents were citizens of Greece. On January 15, 1968, the Board ordered that the proceedings be reopened for the purpose requested and for such further action as the Special Inquiry Officer might deem appropriate.

Prior to the reopening of the hearing under the Board's order, the female respondent had approved in her behalf a visa petition according her a sixth preference. At the hearing she applied for status as a permanent resident. A visa number for use during August was assigned to her.

For ready reference I will set forth the facts as I summarized them in my decision of August 12, 1965:

> "Prior to their entry the respondents were residents of Argentina. The male respondent first entered the United States on July 24, 1963 as a visitor for business, ostensibly to create a market in the United States for dehydrated garlic and

onions from Argentina and to explore the export of dried fruits and nuts from the United States to that country. In October 1963, he obtained employment with a company known as Chenkers International Custom Brokers. He worked for that company until November of that year. He then obtained employment with 20th Century Fox, a film corporation, and was employed by that corporation until August 1964. His wife first entered this country in December of 1963. In January 1964 she obtained employment at Saks Fifth Avenue as a beautician at a salary of $50 a week. On or about March 10, 1964, they applied for extensions of their temporary stay. In his application the male respondent falsely stated that he had not been employed in the United States, that he had his own business, importing and exporting dehydrated vegetables, fruits, etc. and that his income was $400 a week. In her application the female respondent falsely stated she was not employed and was being supported by her husband. They were made the subjects of deportation proceedings, and on July 31, 1964 were granted the privilege of voluntary departure in lieu of deportation. On August 20, 1964, they left for Argentina.

"As stated, they returned to the United States at Detroit, Michigan, on or about November 18, 1964. They were admitted with nonimmigrant visitors' visas which they obtained at Montevideo, Uruguay. Their purpose in reentering the United States was to have a private bill introduced so that they could become permanent residents, if possible. The female respondent is employed full time as a beautician and earns between $180 and

$200 per week. The male respondent worked for a period of four days after his entry into the United States.

"The male respondent testified that he has been married twice, both times in Greece. It appears that when he married his present wife, civil proceedings terminating his first marriage had not been completed. After he and his wife left for Argentina, criminal proceedings were instituted against him in Greece, charging bigamy. He was convicted in absentia of this crime and was sentenced to serve several years imprisonment."

At the reopened hearing the female respondent submitted a number of letters showing that she is an expert in the rebuilding of fingernails and is well thought of by her clients. She earns approximately $12,000 a year. Her husband is employed as the assistant manager of the clothing department of a department store, and earns in the vicinity of $10,500 to $11,000 per year. There was also made part of the record evidence showing that in addition to his conviction of bigamy in Greece on January 31, 1946, the male respondent was convicted in that country of disturbing public functions, and was sentenced to ten days imprisonment and fined a thousand drachmas, and he was convicted possibly in absentia on March 9, 1955, of theft, for which he was sentenced to 35 days imprisonment, and on May 6, 1955 of theft for which he was sentenced to 10 days imprisonment, and that he is wanted by an army court for desertion. It also appears that he has been wanted since September 2, 1963 in Argentina for "swindle."

Since coming to the United States neither the male respondent nor his wife have had any brushes with the law. They have solidly established themselves in this country. Because of this I would be inclined to grant her application for status as a permanent resident under Section 245.

If I did so, of course, her husband could also apply for such relief. However, as noted, the respondents entered this country with the intention to become permanent residents if possible. By doing so they avoided the visa issuing function of the Consular Service. The Board of Immigration Appeals has held that in such cases applications for status as permanent residents should not be granted. *Matter of Diaz-Villamil*, 10 I. & N. Dec. 494, *Matter of Rubio-Vargas*, 11 I. & N. Dec. 167. The female respondent's application for status as a permanent resident will, therefore, be denied. However, they will both be permitted to depart voluntarily at their own expense, if they wish to do so.

It Is Ordered that the female respondent's application for status as permanent resident under the provisions of Section 245 of the Immigration and Nationality Act be denied.

It Is Further Ordered that in lieu of an order of deportation the respondents be granted voluntary departure without expense to the Government on or before September 27, 1968, or any extension beyond such date which may be granted by the District Director, and under such conditions as the District Director shall direct.

It Is Further Ordered that if the respondents fail to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: they shall be deported from the United States to Greece on the charge in the Orders to Show Cause.

/s/ Chester Sipkin,
Special Inquiry Officer.

Appendix D

United States Department of Justice
Board of Immigration Appeals

Files: A-13858350—San Francisco
A-13876264

In re: Stavros Constantin Thomaidis and
Helena Thomaidis

In Deportation Proceedings
Appeal
Oral Argument: November 12, 1968

On behalf of respondents:
Joseph S. Hertogs, Esquire,
580 Washington Street,
San Francisco, Calif. 94111,
(Brief filed).

On behalf of I & N Service:
R. A. Vielhaber, Esquire,
Appellate Trial Attorney,
Stephen M. Suflin, Esquire,
Trial Attorney,
(Brief filed).

Charges:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—remained longer, visitors (both respondents).

Lodged: None.

Application: Section 245 of the Immigration and Nationality Act, female respondent; none, male respondent.

The special inquiry officer found respondents deportable and granted voluntary departure. He denied

the female respondent's application for adjustment of status. The appeal is from this denial. Deportability is not in issue. The appeal will be dismissed.

The facts are fully stated in previous orders of the Board and the special inquiry officer. Briefly, the respondents are citizens of Greece. The male, 47 years old, is a native of Turkey; the female, 46 years old, a native of Egypt. They left the United States on August 20, 1964, after having been given voluntary departure in deportation proceedings. They returned on November 18, 1964 with visitors' visas. They came with the intention of remaining permanently, if they could, through the agency of a private bill (pp. 18, 26 hearing of August 12, 1965; pp. 32-34, hearing of August 28, 1968).

The female respondent has an approved sixth preference status. She applied for adjustment of status. The special inquiry officer denied her application, stating that he was inclined to grant relief, but could not do so under Board precedents holding that an alien who entered the United States intending to become a permanent resident, thus avoiding the visa issuing functions of the consular service, was not to be granted an adjustment unless substantial equities existed. He relied upon *Matter of Rubio-Vargas*, 11 I&N Dec. 167 (BIA 1965); *Matter of Diaz-Villamil*, 10 I&N Dec. 494 (BIA 1964).

In his brief, counsel stated that the first precedent indicates that an alien who has avoided the visa issuing function may, nevertheless, be granted an adjustment. He distinguished the second precedent

on the ground that the alien there was uncooperative. He contended that although the record establishes that the respondents intended to seek any benefits that might have been available to them in the United States, it does not affirmatively establish that they were seeking to bypass visa issuing functions. He pointed out that the respondents indicated that they would comply with orders of the Service, and that when they entered, they could not have obtained an adjustment under section 245. He stated that respondents did not obtain their visas by misrepresentation, and that there are substantial equities existing.

At oral argument, counsel pointed to the many exhibits testifying to the female respondent's ability as a manicurist; her unusual proficiency in repairing broken fingernails by the application of an artificial coating; the scarcity of such expertise; and the importance to the writers of the testimonials, in their occupations and pursuits, in having nails that are well groomed. Counsel also pointed to the lack of adverse information affecting the female respondent. He stated that the asset she would be to the community, and her qualifications and background, are equities which should be considered. He pointed to the special inquiry officer's comment indicating that he would have granted the application were it not for the Board precedents. He stated that the mere fact that respondents desire to stay, if they could, should not be held against them.

In his reply brief, the trial attorney stated that the Board previously held respondents were not bona

fide nonimmigrants. He found an absence of substantial equities.

The record establishes that the respondents came to the United States with the intention of becoming permanent residents. They attempted to avoid the normal visa issuing process. Section 245 was not meant to reward such conduct. Where outstanding equities exist, we will grant relief in a proper case; however, such strong equities do not exist here. The good character of the female respondent, her established proficiency in her field and the need for her skills have been taken into consideration, but we do not find these equities strong enough to warrant favorable action.

Order: It is ordered that the appeal be and the same is hereby dismissed.

.....

Chairman

Appendix E

United States Department of Justice
Board of Immigration Appeals

Files: A13 858 350—San Francisco
A13 876 264

In re: Stavros Constantin Thomaidis and
Helena Thomaidis.

In Deportation Proceedings.

Motion.

On Behalf of Respondents:
Joseph S. Hertogs, Esquire,
580 Washington Street,
San Francisco, Calif. 94111,
(Brief filed).

On Behalf of I&N Service:
Stephen M. Suffin,
Trial Attorney,
(Brief filed).

Deportable: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—remained longer, visitors (both respondents).

Application: Adjustment of status.

On March 28, 1969 the Board dismissed the female respondent's appeal from the special inquiry officer's denial of her application for adjustment of status. Deportability was not in issue. Counsel moves for reconsideration on the ground that respondent estab-

lished she is worthy of relief and on the ground that the Board has granted relief in less deserving cases.

We have examined the cases cited by counsel, but find that they are not cases of aliens similarly situated as the female respondent. In neither *Matter of Castillo*, A17 286 241 (BIA March 21, 1969), nor *Matter of Gubatan and Gubatan*, A13 711 191, A17 266 975 (BIA, February 26, 1969) was there a finding that the applicant intended to adjust status to that of a permanent resident prior to arrival. Moreover, in the latter cases there were United States citizen children involved. In *Matter of Tonga*, Interim Decision 1730 (BIA 1967) denial was based on the fact that the respondent had a preconceived intent to remain in the United States permanently. After careful review of the record we find no reason to reverse our previous decision (See *Santos v. INS*, 375 F.2d 262 (9 Cir. 1967)).

Order: The motion is dismissed.

.....

Chairman

Appendix F

8. C.F.R. 242.8 *Special Inquiring Officer—(a) Authority.* In any proceeding considered under this part the special inquiry officer shall have the authority to determine deportability and to make decisions, including orders of deportation provided by section 244(b) of the Act; to reinstate orders of deportation as provided by section 242(f) of the Act; to determine applications under sections 244, 245, and 249 of the Act; to determine the country to which alien's deportation will be directed in accordance with section 243(a) of the Act; to order temporary withholding of deportation pursuant to section 243(h) of the Act; and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case. A special inquiry officer shall have authority to certify his decision in any case to the Board of Immigration Appeals when it invokes an unusual complex or novel question of law or fact. Nothing contained in this part shall be construed to diminish authority conferred on special inquiry officer's by the Act.

8 C.F.R. 242.17 *Ancillary matters, applications—(a) Creation of the status of an alien lawfully admitted for permanent residence.* The respondent may apply to the special inquiry officer for suspension of deportation under section 244(a) of the Act, for adjustment of status under section 245 of the Act, or for creation of a record of lawful admission for permanent residence under section 249 of the Act; such

application shall be subject to the requirements contained in Parts 244, 245, and 249 of this chapter. The special inquiry officer shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford him an opportunity to make application therefor during the hearing. In exercising discretionary powers to grant or deny an application under this paragraph, the special inquiry officer may consider and rely upon information not contained in the record, provided the Commissioner has determined that it is in the interest of the national security and safety to do so.

8 C.F.R. 242.20 *Finality of Order.* The order of the special inquiry officer shall be final except when the case is certified to the Board as provided in Part 5 of this chapter or an appeal is taken to the Board by the respondent or the trial attorney.

Appendix C

Mr. Suffin: Mr. Sipkin, I would like to offer in evidence the results of the medical examination of the female respondent.

The Special Inquiry Officer: Any objection, Mr. Hertogs?

Mr. Hertogs: No objection.

The Special Inquiry Officer: The report of the medical examination will be received in evidence and marked *Exhibit 8*.

Mr. Suffin: Mr. Sipkin, the record should reflect that the female respondent has been accorded classification under Section 203(a)(6) on the basis of a petition filed October 13, 1967, and it was approved January 5, 1968, and the petition is valid until October 11, 1968. And the basis of the sixth preference was her employment under the occupation title used by the Department of Labor as a manicurist.

The Special Inquiry Officer: Is a visa available to her under the bulletins of the State Department?

Mr. Suffin: A number has been allocated for her use in August. It's automatically done by the Travel Control Branch when they send it down to me. This respondent, you will notice in the record, was born in Egypt, not in Greece. I have no further questions of this respondent, Mr. Sipkin.

Note: Mr. Suffin, Trial Attorney, Immigration and Naturalization Service. Mr. Hertogs, Attorney for Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1118

STAVROS C. THOMAIDIS AND HELENA THOMAIDIS,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 431 F. 2d 711.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1970 (Pet. App. B). The petition for writ of certiorari was filed on December 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the administrative denial of petitioner Helena Thomaidis' application for adjustment of status to that of an alien admitted for permanent residence

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constituted a legitimate exercise of discretion in the circumstances of this case.

STATUTE INVOLVED

Section 245 of the Immigration and Nationality Act of 1952, 66 Stat. 163, *et seq.*, as amended, 8 U.S.C. 1255, provides in pertinent part as follows:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

STATEMENT

The relevant facts, which are summarized in the opinions of the board of immigration appeals and the special inquiry officer (Pet. App. C and D), show the following:

Petitioners, who are Greek nationals (Pet. App., p. xi), first came to this country in 1963 from Argentina as nonimmigrant visitors. Stavros Thomaidis entered first, ostensibly to engage in an import-export business between Argentina and this country; however, he quickly obtained different employment (Pet. App., pp. v–vi). Helena Thomaidis then joined him as a nonimmigrant visitor and almost immediately became employed. Thereafter, both applied for extensions of stay

in the United States. In his application Stavros falsely stated that he was self-employed; Helena falsely stated that she was unemployed. The Immigration Service instituted deportation proceedings and granted the privilege of voluntary departure in lieu of deportation. Petitioners left for Argentina in August 1964 (Pet. App., p. vi).

Petitioners returned to the United States in November 1964 and were again admitted as nonimmigrant visitors on visas. They reentered with the express purpose of seeking permanent residence by way of a private bill (Pet. App., pp. vi, xi).

Petitioners again violated their status by accepting employment here, and overstayed their authorized time (Pet. App., p. vii). A second deportation proceeding was thereupon commenced (Pet. App., pp. ii, iv, x). The special inquiry officer entered an order that petitioners be deported to Argentina and petitioners' appeal to the Board of Immigration Appeals was dismissed on December 1, 1965 (Pet. App., p. v). Upon Argentina's refusal to allow petitioners to enter, the deportation proceedings were reopened on January 15, 1968, so that a new country for deportation might be designated [1] (Pet. App., p. v).

At the reopened hearing, Helena applied for the discretionary relief of adjustment of status to permanent

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[1] In the meantime, Helena's employer obtained for her a sixth preference visa petition for quota purposes under Section 203 (a)(6) of the Act, 8 U.S.C. (Supp. V) 1153(a)(6); she is employed as a manicurist with a specialty of rebuilding damaged fingernails (Pet. App., pp. vii, xii).

residence under Section 245 of the Act.[2] The special inquiry officer denied adjustment of status on the ground that petitioners had come to this country as nonimmigrants under circumstances which circumvented the normal visa-issuing process before an American consular officer abroad; in support he relied upon previous decisions of the Board of Immigration Appeals, *Matter of Rubio-Vargas*, 11 I & N Dec. 167 and *Matter of Diaz-Villamil*, 10 I & N Dec. 494. (Pet. App., p. viii.) Petitioners were granted the privilege of departing voluntarily in lieu of deportation; alternatively, their deportation to Greece was directed if they failed to depart voluntarily.

On March 28, 1969, upon a *de novo* examination, the Board affirmed the special inquiry officer's decision (Pet. App. D and E).

ARGUMENT

Petitioners contend that the denial of Helena's application for adjustment of status as a matter of discretion was defective because the special inquiry officer based his determination upon earlier decisions of the Board of Immigration Appeals in similar cases, thereby (1) failing to exercise his personal discretion (Pet. 7–9) and (2) unlawfully relying on evidence not

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[2] Stavros could not meet the visa-availability requirement of Section 245 because, as a native of Turkey, he would have to apply under the over-subscribed nonpreference portion of the Turkish quota. If Helena's Section 245 application were approved, however, she could petition in Stavros' behalf as an "immediate relative" under Section 201(b) of the Act, 8 U.S.C. (Supp. V) 1151(b) (See Pet. 5).

in the record (Pet. 9–12). This contention is groundless.

Section 245(a) of the Act, 8 U.S.C. 1255(a), authorizes the Attorney General, in his discretion, to adjust the status of aliens in the United States to permanent residence if they meet certain statutory conditions; the effect is to provide a discretionary avenue of relief for eligible nonimmigrant aliens in the United States to obtain permanent residence status without proceeding to a consulate abroad to submit to the normal immigrant visa-issuing process. See Gordon & Rosenfield, *Immigration Law and Procedure*, §§ 7.3 and 7.7. The statute gives no guidance as to the specific matters to be taken into consideration or the weight to be given to favorable or adverse factors in the process of making this discretionary determination. It is for the Attorney General to develop appropriate criteria in this regard. See *Fook Hong Mak* v. *Immigration and Naturalization Service*, C.A. 2, No. 34237, decided November 24, 1970; *Jarecha* v. *Immigration and Naturalization Service*, 417 F. 2d 220, 223–224 (C.A. 5). The consideration of such cases has led to the development of consistent administrative criteria barring discretionary relief to any nonimmigrant alien who has obtained entry to the United States in a temporary status with the intent to remain permanently and thereby avoid the usual immigrant processing procedures abroad, unless there are strong countervailing equities. *E.g.*, *Matter of Tonga*, 12 I & N Dec. 212 (B.I.A.); *Matter of Rubio-Vargas*, 11 I & N Dec. 167 (B.I.A.); *Matter of Diaz-*

Villamil, 10 I & N Dec. 494 (B.I.A.). This position has been consistently upheld in the courts as a proper principle for the exercise of discretion. *E.g.*, *Chen* v. *Foley*, 385 F. 2d 929, 935 (C.A. 6), certiorari denied, 393 U.S. 838; *Santos* v. *Immigration and Naturalization Service*, 375 F. 2d 262, 264 (C.A. 9); *Cubillos-Gonzales* v. *Immigration and Naturalization Service*, 352 F. 2d 782 (C.A. 9); *Castillo* v. *Immigration and Naturalization Service*, 350 F. 2d 1 (C.A. 9). Thus, when the Special Inquiry Officer considered this case under the above standard he was not refusing to exercise discretion or relying on evidence outside the record; he was merely exercising discretion within the limits properly established by the Attorney General in accordance with normal adjudicatory procedure. Indeed, by regulation, selected decisions of the Board of Immigration Appeals, such as the ones cited above, "serve as precedents in all proceedings involving the same issue or issues" 8 C.F.R. 3.1(g) (1970).

In any event, any possible defect in the decision of the Special Inquiry Officer was cured by the Board of Immigration Appeals. The Board has jurisdiction to exercise *de novo* the authority and discretion of the Attorney General to the extent deemed necessary for proper disposition of each case before it. See 8 C.F.R. 3.1(d)(1); *Navarrola-Bolaina* v. *Immigration and Naturalization Service*, 395 F. 2d 131 (C.A. 9); *Ng* v. *Pilliod*, 279 F. 2d 207, 211 (C.A. 7), certiorari denied, 365 U.S. 860; Gordon & Rosenfield, *supra*, § 1.10e(2). That was what the board did here, specifically finding that the favorable factors were not

strong enough to overcome petitioners' deliberate attempt to avoid the normal visa-issuing procedures abroad (Pet. App. D). The court of appeals thus properly held that no abuse of discretion had occurred.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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